



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 15, 1994

Mr. Anthony Grigsby
Executive Director
Texas Natural Resource Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR94-072

Dear Mr. Grigsby:

Your predecessor, Mr. Jesús Garza, asked this office whether certain information held by the Texas Water Commission is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code (former V.T.C.S. article 6252-17a).¹ Mr. Garza's request was assigned ID# 18759.

The Texas Natural Resource Conservation Commission (the "commission") received an open records request for "information regarding all enforcement action [*sic*] against Lowry's Tank and Terminal/Intercoastal Fuels, both for wastewater (Permit No. 02565) and hazardous waste (SW Registration No. 30773)." The commission contends that pursuant to former sections 3(a)(3) and 3(a)(11) of the Open Records Act (now found at sections 552.103 and 552.111, respectively, of the Government Code) the commission may withhold from required public disclosure an inter-office memorandum which outlines the commission's suggested enforcement strategy in regard to various violations of commission rules and regulations.

To secure the protection of section 552.103, a governmental body must demonstrate that requested information "relates" to pending or reasonably anticipated litigation. Open Records Decision No. 551 (1990). The exception applies in judicial, as well as some quasi-judicial, forums. *Id.* Quasi-judicial forums in which the exception applies are those in which contested cases are heard before an administrative agency under the Administrative Procedure and Texas Register Act, Government Code chapter

¹The Seventy-third Legislature repealed article 6252-17a, V.T.C.S. Acts 1993, 73d Leg., ch. 268, § 46, at 988. The Open Records Act is now codified in the Government Code at chapter 552. *Id.* § 1. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

2001. Open Records Decision No. 588 (1991). You have not informed us that the memorandum relates to pending or anticipated litigation. Nor have you indicated that the memorandum relates to a contested case heard before your agency which is pending or reasonably anticipated. The memorandum itself does not indicate that litigation of any sort is pending or contemplated; it memorializes discussions about certain enforcement actions the commission will take. We conclude that in this instance you have not made the requisite showing that the requested information relates to pending or reasonably anticipated litigation for purposes of section 552.103.

You also raise former section 3(a)(11) of the Open Records Act as an exception to the required public disclosure of the memorandum. Section 552.111 of the Government Code protects interagency and intraagency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity's policymaking process. Open Records Decision No. 615 (1993) at 5. The purpose of this section is "to protect from public disclosure advice and opinions *on policy matters* and to encourage frank and open discussion within the agency in connection with its decision-making processes." *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.) (emphasis added). However, section 552.111 does not protect facts and written observation of facts and events that are severable from advice, opinions, and recommendation. Open Records Decision No. 615 at 6. We agree that portions of the memorandum contain advice, opinion, or recommendation of agency staff regarding the agency's policy functions and that such information comes under the protection of section 552.111. Consequently, the commission may withhold the marked portions of the memorandum.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,


Rebecca L. Payne
Section Chief
Open Government Section

RLP/RWP/rho

Ref.: ID# 18759

Enclosures: Submitted documents

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